

ARKANSAS SUPREME COURT

No. CR 07-1340

CHRISTOPHER NEWTON WHITE
Appellant

v.

STATE OF ARKANSAS
Appellee

Opinion Delivered December 4, 2008

APPEAL FROM THE CIRCUIT COURT
OF BENTON COUNTY, CR 2003-1001,
HON. DAVID S. CLINGER, JUDGE

AFFIRMED.

PER CURIAM

In 2005, appellant Christopher Newton White was found guilty by a jury of two counts of rape and sentenced to 420 months' imprisonment on each count to be served concurrently. We affirmed the judgment. *White v. State*, 367 Ark. 595, 242 S.W.3d 240 (2006). Subsequently, appellant timely filed in the trial court a verified petition under Arkansas Rule of Criminal Procedure 37.1. The trial court denied the petition without a hearing, and appellant has lodged an appeal here from the order.

We do not reverse a denial of postconviction relief unless the trial court's findings are clearly erroneous. *Greene v. State*, 356 Ark. 59, 146 S.W.3d 871 (2004). A finding is clearly erroneous when, although there was evidence to support it, the appellate court after reviewing the entire evidence is left with the definite and firm conviction that a mistake has been committed. *Flores v. State*, 350 Ark. 198, 85 S.W.3d 896 (2002). For the reasons set forth below, we find no error and affirm the decision of the trial court.

Appellant's first point on appeal concerns the rape-shield statute, codified as Arkansas Code Annotated § 16-42-101 (Supp. 1999). He contends that the statute, which excludes inquiry at trial into a victim's irrelevant prior sexual conduct, was unconstitutional as it was applied to his case. He maintains that the unconstitutional application resulted in him being precluded from presenting a defense to the charges against him. The particular defense raised by appellant in the Rule 37.1 petition, and now on appeal, is that the victims, who are his biological daughters, were brow-beaten and induced to fabricate claims of rape against him, thus sustaining a motive and defense to the criminal charges.

The record in appellant's direct appeal reveals that trial counsel filed pretrial motions seeking to admit evidence of prior sexual conduct of both the victims.¹ In the motions, trial counsel urged the court to conclude that the rape-shield statute worked to obviate appellant's constitutional right to present a defense. For legal support, counsel cited the same cases that are now relied upon in this postconviction appeal.

During the hearings on these motions, trial counsel reiterated the arguments contained in the motions. Counsel further averred that another defensive posture to take at trial was that access to the victims by certain people "influenced them [and] the statements that they made. That's the type of evidence [the defense was] trying to get in." At another point in the hearings, counsel again maintained that introduction of the victims' prior sexual acts "would go to the line of defense that the kids were actually affected by the suggestions of other people[.]"

¹In the pretrial motions, appellant argued that the victims' prior sexual contact with other males would substantiate several defense tactics. These tactics included arguing that: (1) the victims' knowledge of sexual matters resulted from sexual contact with others and not from appellant; (2) the victims' sexual contact with other males occurred at approximately the same time as appellant's sexual involvement with the victims; (3) the victims' credibility could be questioned on the basis of the prior sexual contact with other males.

Before ruling, the trial court acknowledged this specific defense proposed by appellant, and confirmed that appellant contended that while the victims were in state custody, they began fabricating allegations against appellant and making inconsistent statements. The court then denied the defense's motion to push aside the rape-shield protection provided to the victims. From the evidence presented at the hearings, the court found that it was unable to see "points of confusion or something that led [the court] to believe these kids d[id]n't know what happened to them or who did it[.]"

After entry of the judgment of conviction, trial counsel filed a motion for a new trial, which was denied after a hearing. Therein, appellant restated the arguments contained in the pretrial motions. He also reasserted the defense that the victims had been coerced, coached, and influenced by adults with whom they had contact to falsely allege that their father had raped them.

In the direct appeal, appellant argued that the trial court erred in denying the rape-shield motion, and we affirmed the trial court's decision on that point. Appellant then sought a rehearing by this court. We denied the petition for rehearing after considering appellant's argument that "the rape-shield statute as applied to these particular facts is unconstitutional because it prevented [appellant] from presenting a defense." 367 Ark. at 610, 242 S.W.3d at 252.

Postconviction relief under Rule 37.1 is a means to collaterally attack a conviction. *Camargo v. State*, 346 Ark. 118, 55 S.W.3d 255 (2001) (citing *Davis v. State*, 345 Ark. 161, 44 S.W.3d 726 (2001)). It does not provide a method for the review of mere error in the conduct of the trial, provide an appellant with a means to raise an issue again after previously raising it in the trial court, or provide a procedure to address an evidentiary issue. *Davis, supra*; *Johnson v. State*, 321 Ark. 117, 900 S.W.2d 940 (1995). Rule 37.1 also is not a substitute for an appeal nor does it provide a remedy

when an issue could have been raised in the trial or argued on appeal. *Davis, supra*. Even constitutional issues must be raised at trial or on direct appeal. *Williams v. State*, 346 Ark. 54, 56 S.W.3d 360 (2001). These types of claims constitute a direct attack on a judgment and would not be cognizable in a Rule 37.1 petition. *Camargo, supra; Davis, supra*.

Here, it is clear that appellant's claim is not cognizable in a Rule 37.1 petition although couched as an ineffective-assistance-of-counsel allegation. The contention advocated by appellant in the first point on appeal is precisely the same argument made by appellant in the pretrial motion hearings, in the motion for new trial, and on direct appeal, including the petition for rehearing. Appellant may not use a Rule 37.1 petition to raise an issue again after previously raising it in the trial court. *Davis, supra*. Appellant's claim is essentially an attempt to reargue an evidentiary issue that was settled prior to trial, which is also prohibited. *Johnson, supra*. Even cloaked as a constitutional issue, appellant may not raise this argument in a postconviction petition. *Williams, supra*. In short, appellant's first point on appeal presents various direct attacks on the judgment. We affirm the trial court's ruling on this point as appellant fails to establish that he was entitled to relief under Rule 37.1.²

In the next three points on appeal, appellant maintains that the trial court erred in finding that trial counsel was not ineffective when counsel failed to: (1) comply with discovery requirements thereby causing evidence to be excluded; (2) object and move for dismissal after destruction of exculpatory evidence; (3) object to repeated coercive and leading questions posed to the victims.

²Apparently based upon the order denying the petition for rehearing, appellant claims here that judicial estoppel prevents us from holding that appellant previously raised this issue at trial. This argument is supported neither by the facts of this matter nor the language contained in our rehearing denial. As shown in the direct appeal record, counsel raised this issue in the trial court a number of times, the trial court ruled on this very issue, and appellant is now precluded from raising it again in a postconviction proceeding.

Under the standard for showing ineffective assistance of counsel, appellant must prove that counsel's performance was deficient and, as a result, that appellant was deprived of a fair trial. *Strickland v. Washington*, 466 U.S. 668 (1984); *Jackson v. State*, 352 Ark. 359, 105 S.W.3d 352 (2003). The totality of the evidence before the factfinder must be considered in determining a claim of ineffective assistance of counsel. *Greene, supra*. There is a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. *Noel v. State*, 342 Ark. 35, 26 S.W.3d 123 (2000). The burden is on appellant to provide facts to support his claims of prejudice. *Nelson v. State*, 344 Ark. 407, 39 S.W.3d 791 (2001) (per curiam).

In considering a claim of ineffective assistance of counsel, judicial review of counsel's performance must be highly deferential. *Andrews v. State*, 344 Ark. 606, 42 S.W.3d 484 (2001) (per curiam). A fair assessment of counsel's performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's conduct, and to evaluate the conduct from counsel's perspective at the time. *Id.*

In the first ineffective-assistance claim, appellant contends that counsel failed to comply with discovery requirements and prevented a defense witness, Dr. Virginia Krauft, from testifying at trial. Dr. Krauft presented herself as an expert in identifying suggestible questions posed during forensic child interviews. Prior to trial, the prosecutor sought numerous times to obtain reports authored by Dr. Krauft in order to prepare for cross-examination. Counsel refused to provide any documents by Dr. Krauft, and the prosecutor filed a motion to exclude her as a witness for the defense based upon counsel's refusal.

At the hearing on the prosecutor's motion, trial counsel contended that Dr. Krauft produced no reports, and that the correspondence from her to counsel contained work product that was not

discoverable by the prosecution. Counsel then offered to provide a redacted version of the correspondence to the prosecutor. Nevertheless, the court granted the prosecutor's motion to preclude Dr. Krauft as an expert witness.

During the trial, counsel again raised the issue of Dr. Krauft's testimony and provided the prosecution with the unredacted version of her correspondence. In addition, counsel put Dr. Krauft on the witness stand to proffer her intended testimony and expert opinion. The court again found that counsel's failure to provide the reports to the prosecutor was fatal to the defense's ability to call Dr. Krauft as a witness.

The trial court then ruled that Dr. Krauft's proposed testimony did not relate to the facts of the case at hand "whatsoever." The court characterized Dr. Krauft's testimony as "just some general theory" for which an expert was not required. Relying upon Arkansas Rules of Evidence 702 and 703, we held on direct appeal that the trial court correctly determined that Dr. Krauft's testimony as an expert was not necessary as it provided nothing more than common knowledge.

Appellant argues here that Dr. Krauft's testimony was precluded due only to counsel's failure to timely provide Dr. Krauft's correspondence to the State. This argument fails to take into account the trial court's entire ruling. Assuming that counsel had provided the requested correspondence to the State, appellant fails to show that Dr. Krauft's testimony would have otherwise been allowed when the trial court pointedly ruled that the testimony was irrelevant and failed to rise to the level of an opinion that an expert was required to provide.

Here, counsel's failure to produce Dr. Krauft's correspondence alone cannot support a claim of ineffective assistance. Appellant also fails to demonstrate that he was prejudiced as a result because Dr. Krauft's testimony was ultimately found to be inadmissible at trial without regard to any

discovery violation. *Nelson, supra*. The trial court's ruling is affirmed.

Next, appellant argues that counsel was ineffective for failing to move for dismissal based upon destruction of allegedly exculpatory evidence. Witnesses at one of the rape-shield motion hearings testified about a videotaped interview of one of the victims. The tape, in which the victim alleged sexual abuse by a person other than appellant, had been destroyed.³

An allegation of sexual contact between one of the victims and a third party is the exact information appellant sought to introduce at trial through the rape-shield motions. In denying the motions, the trial court unambiguously ruled that such information regarding a third party was irrelevant, which we affirmed in the direct appeal. Based upon the trial court's prior ruling, the videotape at issue did not contain either admissible or exculpatory information, and appellant fails to demonstrate otherwise. Appellant's argument amounts to a persistent and indirect effort to extract reconsideration of appellant's rape-shield statute motions, thereby circumventing the trial court's ruling on the motions.

As counsel was not required to make an argument without merit, appellant fails to demonstrate that counsel's representation was deficient under *Strickland* in this instance. *Greene, supra*. Further, appellant lacks factual support for his claim of prejudice purportedly rendered by the destruction of non-exculpatory evidence. *Nelson, supra*. We find no error and affirm the trial court.

In appellant's last claim of ineffectiveness, he posits that counsel failed to "seek a hearing on the taint to the alleged victims by repeated coercive and leading questioning." Further, he laments

³Katie Friesen, a forensic interviewer with the Children's Advocacy Center in Benton County, conducted the interview. She then turned the videotape over to Amber Collins with the Arkansas State Police. Ms. Collins testified that the videotape and all documents related to the interview had been destroyed when she was not able to substantiate the claim made by the victim.

counsel's failure to challenge the victims' competency as witnesses based on the alleged repeated questioning.

Even though couched as a completely new issue that purportedly concerns a lack of due process, this point on appeal involves nothing more than restating arguments contained in both the pretrial rape-shield motions and the first point on appeal. Neither argument provides a valid basis for a postconviction claim, and this issue posed by appellant likewise fails to do so.

Nevertheless, to the extent that this argument presents an independent claim for ineffective assistance of counsel, appellant fails to state grounds for postconviction relief. First, this argument is confined to conclusory allegations. Appellant denounces "repeated questioning," "this sort of questioning," and "repeated coercive and leading questioning" as creating the "taint" of the victims' allegations against him. Other than using these conclusory descriptions, his petition and appellate brief do not contain any examples of what he contends to be the offensive questions posed to the victims.

Appellant's argument does refer to Dr. Krauft's correspondence, and apparently considers that information to be an inventory of the offensive questioning. Her suggestions to trial counsel concerned interviews and specific questions that pertained to the alleged prior sexual conduct of the victims, which the trial court consistently held to be irrelevant and inadmissible. Also, the entirety of Dr. Krauft's analysis of the victims' interviews was not considered by the court or the jury, whereas a claim of ineffectiveness is based on the totality of the evidence presented at trial. *Greene, supra; Jackson, supra*. Even if her correspondence were to be considered on its face, Dr. Krauft was not deemed by the trial court to be an expert in her stated field of work. Thus, her correspondence does not present an expert opinion regarding suggestibility in the questions posed to the victims and

does not support appellant's claim of coercive questioning.

Furthermore, appellant cites a New Jersey state court case as authority for the proposition that the victims were incompetent to testify based upon the alleged suggestive and coercive questioning, *State v. Michaels*, 136 N. J. 299, 642 A.2d 1372 (1994). In any event, the standard for determining the competency of a child witness is settled in Arkansas. The trial court looks to whether the child possesses a moral awareness of the obligation to tell the truth, and an ability to observe, remember, and relate facts. *Clem v. State*, 351 Ark. 112, 90 S.W.3d 428 (2002).

The case relied upon by appellant has no binding authority on this court, and he cites no legal basis to modify how the competency of a child witness is determined by our courts. We will not consider an argument when the appellant presents no citation to authority or convincing argument in its support, and it is not apparent without further research that the argument is well taken. *Weatherford v. State*, 352 Ark. 324, 101 S.W.3d 227 (2003). We affirm the trial court on this point.

In the last point on appeal, appellant posits that newly discovered evidence warrants a new trial. Appellant's claim is based upon evidence that was allegedly unavailable at the time of the trial, but was discovered while appellant's direct appeal was pending. The proposed newly discovered evidence is that a third party who had a connection to one of the victims' foster parents actually raped the victims. We have unambiguously stated that newly discovered evidence is a direct effort to have the judgment vacated, and is not a proper basis for relief under our postconviction rule. *Cigainero v. State*, 321 Ark. 533, 906 S.W.2d 282 (1995) (citing *Chisum v. State*, 274 Ark. 332, 625 S.W.2d 448 (1981)).

Appellant nonetheless maintains that entitlement to due process under the United States and Arkansas Constitutions includes entitlement to "collateral relief." To that extent, appellant cites

Larimore v. State, 327 Ark. 271, 938 S.W.2d 818 (1997), for the proposition that a Rule 37.1 petition can properly be treated as a petition for writ of error coram nobis.⁴ He contends that he should not be forced to wait for resolution of the Rule 37.1 petition to pursue coram nobis relief.

Whether an appellant seeks Rule 37.1 relief does not bear on his or her ability to meanwhile seek leave from this court to file a petition for writ of error coram nobis in the trial court. The two proceedings are not procedurally exclusive and may be pursued simultaneously. *E.g.*, *Dansby v. State*, 343 Ark. 635, 37 S.W.3d 599 (2001). Appellant had the ability to pursue a coram nobis writ while pursuing postconviction relief under Rule 37.1, but elected not to do so. Appellant has demonstrated no error and we affirm the trial court's decision.

Affirmed.

⁴Newly discovered evidence may provide grounds for one of the four bases of coram nobis relief. *See Pitts v. State*, 336 Ark. 580, 986 S.W.2d 407 (1999) (per curiam). Even so, the holding of *Larimore* does not support appellant's contention that a Rule 37.1 petition may be treated as a petition for writ of error coram nobis as a matter of course. What is more, *Larimore* has no applicability to this matter as the cases are not factually similar as suggested by appellant.